SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 43

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

TOM WE SHUNG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

JACK WASSERMAN,
902 Warner Building,
Washington 4, D. C.
ANDREW REINER,
320 Broadway,
New York, New York,
Attorneys for Respondent.

INDEX

INDEX

CITATIONS

Cases:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 43

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

TOM WE SHUNG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals is reported at 227 F. 2d 40 (R. 21-22), and the findings of the District Court are unreported (R. 19).

Jurisdiction

The judgment of the Court of Appeals was entered on October 13, 1955. Certiorari was granted herein on April 23, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

The question presented is not as formulated by petitioner, whether the Immigration and Nationality Act *authorizes* judicial review of exclusion orders in proceedings other than habeas corpus. We submit that the questions presented are:

1. Whether in conformity with Section 12 of the Administrative Procedure Act (5 U.S.C. 1011) the Immigration and Nationality Act of 1952 "expressly" precludes judicial review of exclusion orders.

2. Whether habeas corpus is a form of judicial review.

3. Whether a provision making an administrative exclusion decision "final" conveys a different meaning than the same provision with regard to a deportation order.

Statutes and Regulations

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> "(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial

review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Section 12 of the Administrative Procedure Act (60 Stat. 244, 5 U.S.C. 1011) provides in part:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Section 236(c) of the Immigration and Nationality Act of 1952, 66 Stat. 200, 8 U.S.C. 1226(c), provides in pertinent part:

> " . . . in every case where an alien is excluded from admission into the United States, under this Act, or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General."

Section 360(c) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C. 1503 provides in part:

> "A person *who has been issued a certificate of identity* under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise" (Italics supplied).

8 Code of Federal Regulations 6.1 (1952 Ed.) provides in part:

"*(b) Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

(1) Decisions of special inquiry officers in exclusion cases, as provided in Part 236 of this chapter;

(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter."

8 Code of Federal Regulations 236.14 (1952 Ed.) provides with regard to exclusion cases:

"*Finality of decision.* The decision of the special inquiry officer shall be final except when:

(a) The case has been certified to the regional commissioner, as provided in § 7.1(b) of this chapter, or certified to the Board as provided in § 6.1(c) of this chapter; or

(b) The alien takes an appeal as provided in § 236.15; or

(c) The district director or officer in charge takes an appeal as provided in § 236.16."

8 Code of Federal Regulations 242.61-e (1952 Ed.) provides with regard to deportation cases:

"*Finality of order.* The order of the special inquiry officer shall be final except when:

(1) The case has been certified as provided in § 7.1(b) or § 6.1(c); or

(2) An appeal is taken to the Board of Immigration Appeals."

Statement

Respondent's complaint alleges that he is the blood son of Tom Wing, a World War II veteran and citizen of the United States and that he was admissible to the United States on November 28, 1947, when he arrived at San Francisco and sought entry as the alien son of a veteran pursuant to 8 U.S.C. (1946 Ed.) 232 (R. 15). A three man board of special inquiry consisting of two immigrant inspectors and a clerk-stenographer voted on February 24, 1949, to

exclude respondent. One of these inspectors and the clerk stenographer were not present during the first day of hearing when respondent testified. On appeal to the Board of Immigration Appeals the order of exclusion was affirmed. Respondent seeks a judgment declaring that he is the son of Tom Wing. He also seeks a judgment declaring that his hearing before the board of special inquiry was unfair, *inter alia*, because of the composition of the board of special inquiry, because those who heard his testimony were not the same individuals who rendered the decision, and because the order of exclusion was not supported by substantial evidence (R. 15-16).

A previous declaratory judgment action filed on June 10, 1950, was dismissed by order of the Supreme Court by a vote of 6 to 3 (346 U.S. 906) for lack of jurisdiction upon the authority of *Heikkila* v. *Barber*, 345 U.S. 229 (1953). Thereafter on December 15, 1953, the present action was filed. The District Court dismissed the complaint, ruling that it was without jurisdiction to review an order of exclusion in proceedings other than in a habeas corpus action (R. 19). No written opinion was filed.

The Court of Appeals reversed, on October 13, 1955, remanding the case for trial on the merits (R. 21-23). The reasoning of the Court of Appeals, set forth in *Estevez* v. *Brownell*, 227 F. 2d 38 (C.A. D.C., 1955), decided the same day, states:

> "If appellant were attacking a deportation order instead of an exclusion order, his right to the review he seeks would be clear. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48. We think the principle of that case extends to this one.[1]"

---

[1] "Although the exclusion case of *Tom We Shung* v. *Brownell*, 346 U.S. 906, involved the 1917 Act, and the present case involves the 1952 Act, it is perhaps significant that in *Tom We Shung* the Supreme Court relied solely on *Heikkila*, a deportation case."

Certiorari was granted by this Court on April 23, 1956 to determine the question of jurisdiction raised below.

More than eight years have thus elapsed since respondent's arrival, more than six since the original administrative decision herein, and more than five since the institution of litigation between the parties herein. Respondent continues to hope that he may soon secure a binding judicial decision on the merits.

Summary of Argument

As in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (1954) judicial review of an exclusion order under the 1952 Immigration and Nationality Act may be restricted to habeas corpus only where subsequent Congressional legislation sets forth such express limitation pursuant to section 12 of the Administrative Procedure Act. Admittedly, there is here presented no express limitation on judicial review of exclusion orders.

Petitioner argues, however, that the word "final" as applied to administrative finality of exclusion orders means something different from the same word as applied to deportation orders. This overlooks the fact that in the absence of an express restriction, which is lacking here, the same word in different parts of a statute is assumed to have been used in the same sense throughout the statute. *Pampanga Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218 (1928).

The historical development of judicial review of deportation and exclusion orders reveal similarity of treatment. Deportation was regarded as delayed exclusion. It is not surprising therefore, to find no distinction between judicial review of both exclusion and deportation orders. The legislative history of the 1952 Immigration and Nationality Act reflects such equality. At first Congress sought to confine review of both exclusion and deportation cases to habeas

corpus. (Section 106, *S. 3455*, 81st Congress, 2d Session). The provision was eliminated and the final Congressional report proclaims that "The safeguard of judicial procedure is afforded in both exclusion and deportation proceedings." (*House Report 2096*, 82d Congress, 2d Session p. 127.) Contrary to this legislative history, the petitioner would read into the statute by implication, provisions which the Congress expressly rejected. The 1952 Act expressly limits review to habeas corpus in only two instances i. e., where a person arrives with a certificate of identity (8 U. S. C. 1503-c) and where he is detained under 8 U. S. C. 1252(a) and (c). These express provisions limiting review to habeas corpus disclose an intention to allow other types of judicial review in cases such as the instant case where there is no such express limitation. Practical considerations likewise support the decision below. If declaratory judgment is unavailable, many aliens will be deprived of all judicial review. Finally, we submit that the status question involved herein, i. e., the relationship of respondent to his alleged American father, is reviewable under *Heikkila* v. *Barber*, 345 U. S. 229 (1952) and *Rasmussen* v. *Brownell*, 350 U. S. 806 (1955).

I

Judicial Review Is Not Precluded in Exclusion Cases by the Express Language of the 1952 Immigration Act

The basic argument upon which petitioner grounds his request for reversal herein is that the Immigration and Nationality Act of 1952 precludes judicial review in exclusion cases.

Judicial review is not precluded by the express terms of the immigration statute, and petitioner admits that some judicial review is appropriate in the form of habeas corpus (Brief, p. 19). This is far different from saying that habeas

corpus is the sole remedy. No issue of discretion is here involved, and, accordingly, we are not here concerned with matters entrusted exclusively to agency discretion.

We submit that in the absence of an express exemption from the Administrative Procedure Act as required by section 12 of that Act, limitation of judicial review or confinement of such review to habeas corpus proceedings is not authorized.

(A) Section 10 of the Administrative Procedure Act Authorizes Judicial Review

Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) provides:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (*including actions for declaratory judgment* or writs of prohibitory or mandatory injunction *or habeas corpus*) in any court of competent jurisdiction. * * *"

It is clear from the wording of Section 10 (b) of the Administrative Procedure Act that habeas corpus is one form of judicial review. Concededly, habeas corpus is available to test improper administrative action in exclusion cases. How then can it be said that the immigration statute precludes judicial review, when habeas corpus, a form of judi-

cial review under the Administrative Procedure Act is available? When this is considered against the background of the Act, the answer becomes clearer.

"Very rarely do statutes withhold judicial review," and to "preclude judicial review under this bill a statute if not specific in withholding such review, must on its face give clear and convincing evidence of an intent to withhold it," are the two guiding principles enunciated by the framers of the Administrative Procedure Act. (*Senate Document, No. 248,* 79th Cong., 2d Sess., 212, 275.) In *Estep* v. *United States*, 327 U. S. 114, the immigration decisions including *Geigow* v. *Uhl*, 239 U. S. 3 (1915), an exclusion case, were cited as examples of the types of cases where judicial review was not precluded even though Congress was silent upon the subject.

Section 10, read against this background, permits and authorizes judicial review in immigration cases. The single exception to Section 10(b) is where there is some adequate "special statutory review proceeding," i.e., those "wholly created by statute." (*Senate Document, 248, supra,* pp. 212-213, 276.) But no *special statuory proceeding* is provided for the review of exclusion decisions and of course, habeas corpus is not a "special statutory review proceeding." It is not even mentioned in the exclusion provisions of the Immigration and Nationality Act. In enacting Section 10, Congress observed:

> "* * * The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." (*Senate Document, 248, supra.*)

Obviously, if a declaratory judgment action to determine the validity or application of agency action is proper before the statutory form of review, *a fortiori*, such form of action

is proper where no statutory review proceeding exists. Thus, by Section 10's inescapable mandate, a declaratory judgment action may be maintained in exclusion cases.

(B) No Express Legislation Subsequent to the Administrative Procedure Act Precludes Judicial Review of Exclusion Orders. Shaughnessy v. *Pedreiro, 349 U.S. 48 is Controlling.*

Section 12 of the Administrative Procedure Act (5 U.S.C. 1011 provides that no subsequent legislation shall supersede or modify the Act "except to the extent that such legislation shall do so expressly." The Immigration and Nationality Act of 1952 was subsequent legislation. Concededly, the immigration laws do not "expressly" preclude judicial review or confine such judicial review to habeas corpus proceedings. It is true that no magical passwords are necessary to effectuate an exemption from the Administrative Procedure Act. In *Marcello* v. *Bonds,* 349 U.S. 302, 310 (1954) it was held that subsequent, inconsistent, express language, i.e., the provisions that the deportation sections of the 1952 immigration statute should be "the sole and exclusive procedure for determining the deportability of an alien" overrode the contrary provisions of the earlier Administrative Procedure Act. Here there is no subsequent inconsistent express language overriding Section 10 of the Administrative Procedure Act. As found by the Court below, the instant case is controlled by *Shaughnessy* v. *Pedreiro,* 349 U.S. 48 (1954). In the *Pedreiro* case, this Court observed that section 12 of the Administrative Procedure Act required express language in subsequent legislation to override section 10 of that Act. It was said:

> "In the subsequent 1952 Immigration and Nationality Act there is no language which 'expressly' supersedes or modifies the expanded right of review granted

by § 10 of the Administrative Procedure Act. But the 1952 Immigration Act does provide, as did the 1917 Act, that deportation orders of the Attorney General shall be 'final.' The Government contends that we should read this as expressing a congressional purpose to give the word 'final' in the 1952 Act precisely the same meaning *Heikkila* gave 'final' in the 1917 Act and thereby continue to deprive deportees of all right of judicial review except by habeas corpus. We cannot accept this contention.

"Such a restrictive construction of the finality provision of the present Immigration Act would run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the *Heikkila* case, the Procedure Act is to me given a 'hospitable' interpretation. In that case the Court also referred to ambiguity in the provision making deportation orders of the Attorney General 'final.' It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off right of judicial review in whole or in part. And it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court."

The language of the Court relative to the requirement of express subsequent language superseding Section 10 of the Administrative Procedure Act is equally applicable to review of exclusion orders. There is no express language in the 1952 Act precluding judicial review of exclusion orders of the type entered herein. That the finality provisions of the 1952 Act in regard to exclusion apply likewise to administrative finality is also clear. If there-

fore follows that the Court below properly adhered to the principles enunciated by this Court in the *Pedreiro* case.

II

Judicial Review Is Not Precluded in Exclusion Cases by the Implied Language of the 1952 Immigration Act

For the reasons set forth in Point I, we submit that express language in the 1952 Immigration Act would be required to avoid the impact of Sections 10 and 12 of the Administrative Procedure Act in exclusion cases. *Shaughnessy* v. *Pedreiro, supra.* We submit, however, that even implied language creating an exemption is lacking herein.

Petitioner argues that the word "final" in exclusion proceedings conveys a different meaning than the same word in deportation cases. (Brief, pp. 15-16, 23). It would appear that the Government seeks to make the form of judicial review (i.e., habeas corpus or declaratory judgment) dependent upon the number of administrative appeals or the Attorney General's appellate jurisdiction in the various types of immigration proceedings.

We submit that nothing in the type of administrative appeal in exclusion cases suggests that habeas corpus is the exclusive method of judicial review. The term "final" has the same meaning in exclusion and deportation cases. In the absence of an express restriction, which is lacking in the instant case, the same word in different parts of a statute is assumed to have been used in the same sense throughout the statute. *Pampanga Sugar Mills* v. *Trinidad*, 279 U.S. 211, 218 (1928); *In re Associated Gas & Electric Co.*, 11 F. Supp. 359, 365 (N.D.N.Y. 1935); *State of Texas* v. *United States*, 6 F. Supp. 63, 66 (D.C. Mo. 1934).

The exclusion provisions of the immigration statute [Section 236(c); 8 U.S.C. 1226(c)] state:

"The decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General."

Regulations provide that the exclusion decision is final except where an appeal is taken by the alien or the Immigration Service to the Board of Immigration Appeals or where the case is certified to the Board or the Regional Commissioner. 8 C.F.R. 234.14 (1952 Ed.).

The deportation provisions [section 242(b), 8 U.S.C. 1252(b)] state that:

"The decision of the Attorney General shall be final:"

Deportation regulations [8 C.F.R. 242.61(e), 1952 Ed.] provide:

"The order of the special inquiry officer shall be final except when:

(1) The case has been certified [to the Board of Immigration Appeals by the Board or various Commissioners] as provided in § 7.1(b) or § 6.1(c); or;

(2) An appeal is taken to the Board of Immigration Appeals."

Thus, it will be seen that under outstanding regulations exclusion and deportation orders have the same finality. The special inquiry officer in both cases enters a final order subject to appeal to the Board of Immigration Appeals [by filing a notice of appeal or by certification. 8 C.F.R. 6.1(b)(1), 6.1(b)(2), 6.1(c), 236.14, 242.61(e), 1952 Ed.]. In rare cases, both in exclusion and deportation cases, the Board refers the case for final administrative action to the Attorney General. 8 C.F.R. 6.1(h), 1952 Ed.

It is therefore obvious that the distinction suggested by petitioner has no real significance. The Government recognized this in its brief in this Court in *Brownell* v. *Rabinstein*, 346 U.S. 929 (1953), where it stated at pages 39-40:

"The decision below raises a particularly serious problem in that it suggests, what we do not concede, that orders of the Attorney General excluding aliens from the United States, as well as deportation orders could be challenged in the courts in proceedings other than habeas corpus. As this Court apparently held in *Tom We Shung* v. *Brownell*, *supra*, the rationale of *Heikkila* v. *Barber*, *supra*, compelled the conclusion that under the provision for finality in exclusion cases in Section 17 of the Immigration Act of 1917 (8 U.S.C. 153), Federal Courts lacked jurisdiction to examine exclusion orders except in habeas corpus proceedings. Section 236(c) of the 1952 Act provides, in language taken substantially verbatim from the 1917 Act, that 'where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.' In *Tom We Shung*, this Court apparently found no distinction between the provisions for finality in the deportation and exclusion provisions of the 1917 Act. The same finality provisions were reenacted practically verbatim in Sections 236(c) and 242(b) of the 1952 Act. Obviously, it could be argued that they have and were intended to have the same consequences as to the availability of judicial review."

In *Shaughnessy* v. *Pedreiro*, *supra*, the Government again repeated in its brief (pp. 35-36):

". . . Section 236(c) (8 U.S.C. 1226(c)) merely provides like the former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell*, 346 U.S. 906, that the administrative decision shall be 'final.'"

The distinction suggested by the petitioner (Brief, pp. 14-15) that the word "final" has two different meanings in our immigration laws and that the language of the

finality clause relating to exclusion "suggests" a limitation upon judicial review confined to habeas corpus although the deportation section does not, is completely unwarranted.

III

The Historical Development, the Legislative History, The Structure of the Immigration Statute Itself, and Practical Considerations Support Judicial Review of Exclusion Orders in Declaratory Judgment Actions.

(A) The Historical Development of Judicial Review in Deportation and Exclusion Cases Reveals Similarity of Treatment.

The early immigration cases, some of which involved constitutional attacks upon the substantive provisions of our immigration laws, would deny access to the courts to aliens ordered excluded or deported. *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892) [Exclusion]; *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893) [Deportation]; *Ekiu Young Yo* v. *United States*, 185 U.S. 296 (1902) [Exclusion]; *The Japanese Immigrant Case*, 189 U.S. 86 (1903) [Deportation].

Beginning, however, with *Chin Yow* v. *United States*, 208 U.S. 8 (1908), and *Geigow* v. *Uhl*, 239 U.S. 3 (1915) exclusion cases, judicial review was permitted to determine whether excluded aliens received fair hearings or whether the administrative agency complied with the statute. In *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U.S. 329 (1932), Justice Stone summarized the scope of judicial review in deportation and exclusion cases as follows:

> "The action of the Secretary is, nevertheless subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority, compare *Gonzales* v. *Williams*,

192 U.S. 1, *Geigow v. Uhl*, 239 U.S. 3, whether there was any evidence before him to support his determination, compare *Fajtauer v. Commission of Immigration*, 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness, reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat* v. *White*, 253 U.S. 454, *Tang Tun v. Edsell*, 223 U.S. 673; *Chin Yow v. United States*, 208 U. S. 8, 12; *The Japanese Immigrant Case*, 189 U.S. 86, 100, 101. * * *"

See also: *Secretary of Labor's Committee on Administrative Procedure—The Immigration and Naturalization Service* (1940) p. 45.

After judicial intervention was permitted in immigration cases, this Court made no distinction between judicial review of deportation cases, *Bridges* v. *Wixon*, 326 U.S. 135 (1944); *Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947); *Fong Haw Tan* v. *Phelan*, 333 U.S. 10 (1948); *Sung* v. *McGrath*, 339 U.S. 33 (1950); *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Heikkila* v. *Barber*, 345 U.S. 229 (1953); *U.S. ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1953); *Galvan* v. *Press*, 347 U.S. 522 (1953); *Barber* v. *Gonzales*, 347 U.S. 637 (1953); *Shaughnessy* v. *Accardi*, 349 U.S. 280 (1954); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1954); *Marcello* v. *Bonds*, 349 U.S. 302 (1954); *Jay* v. *Boyd*, 351 U.S. 345 (1955), and exclusion cases. *Johnson* v. *Shaughnessy*, 336 U.S. 806 (1948); *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1949); *Chew* v. *Colding*, 344 U.S. 590 (1952); *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1952); *Shung* v. *Brownell*, 346 U.S. 906 (1952).

To be sure, non-resident aliens seeking admission to the United States, *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1952).

do not have the same constitutional rights as resident aliens seeking entry, *Chew* v. *Colding*, 344 U.S. 590 (1952). Both cases, however, involve exclusion proceedings, and it is evident that although the difference in constitutional rights may affect the scope of review, they do not alter the form of judicial action such review takes. Aliens in deportation proceedings are entitled only to procedural due process, *Galvan* v. *Press*, 347 U.S. 522 (1953). Some aliens may be entitled to the same right in exclusion proceedings, *Chew* v. *Colding*, *supra*. Procedural due process was not the basis for this Court's sanction of declaratory judgment actions in deportation cases. *Shaughnessy* v. *Pedreiro*, *supra*. Moreover, the Government recognizes that "the right of general judicial review of administrative orders is not inevitably a part of due process * * *." (Brief, p. 38). Accordingly, we submit that constitutional rights should play no part in the settlement of the issue herein.

Excluded aliens, admittedly, may seek judicial review through habeas corpus. Permitting such aliens to file declaratory judgment actions will not alter the scope of review.

The scope of review is not dependent on the form of action. As the Attorney General stated (prior to the *Pedreiro* decision), referring to *Heikkila* v. *Barber*, 345 U.S. 229 (1953):

> "Regarding the scope of review, it is doubtful whether the scope is now any different in habeas corpus from that which is accorded to the orders of other agencies under Section 10 of the Administrative Procedure Act." *Report to the Judicial Conference of the United States* (September 1953, p. 43).

The decision of immigration officials excluding an alien (except where based upon confidential information in security cases) must be after a fair hearing and in conformity

with the statutory grounds of exclusion. *Geigow* v. *Uhl*, 239 U.S. 3 (1915); *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920); *Chin Yow* v. *United States*, 208 U.S. 8 (1908). In addition, the exclusion order requires adequate or substantial evidence in the record to support it. *O'Connell ex rel. Kwong Han Foo* v. *Ward*, 126 F. 2d 615 (C.A. 1, 1942); *Chryssikos* v. *Commissioner of Immigration*, 3 F. 2d 372 (C.A. 2, 1924). Accordingly, it is submitted that the scope of review will not be affected by the decision below.

(B) The Legislative History of the 1952 Immigration and Nationality Act Supports the Decision Below

The Government's analysis of the legislative history overlooks six salient rules of statutory construction. *Firstly*, courts should not read into a statute by implication provisions which the legislature has expressly rejected. *Nelson* v. *Westland Oil Co.*, 96 F. Supp. 656, 661 (D.C.N.D. 1949). Congress expressly rejected provisions in the original draft of the McCarran-Walter Act which would have limited review of deportation and exclusion orders to habeas corpus proceedings. *Secondly*, statements by legislators in conflict with committee reports are not to be taken as persuasive of Congressional intent. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1941). The final committee report which preceded the enactment of the Immigration and Nationality Act of 1952, specifically recited that the safeguards of judicial procedure were afforded for excluded and deported aliens and that such judicial procedure remained within the framework and pattern of the Administrative Procedure Act. (*House Report 2096*, 82d Congress, 2d Session, p. 127) Any so called contrary statements during the debates must yield to this expression of Congressional intent. *Thirdly*, statements by legislators and others not in charge of a bill are entitled to no weight in the inter-

pretation of a statute. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493, 494 (1930). The petitioner relies upon views of critics and opponents of the bill to establish Congressional intent. Statements of Senator Murray and Congressman Celler (Pet. Brief, pp. 26, 33n) supporting judicial review of deportation orders or the application of the Administrative Procedure Act to deportation cases are taken by petitioner to conclusively demonstrate what neither specifically stated or necessarily implied—that exclusion orders could only be reviewed in habeas corpus proceedings. *Fourthly,* "the plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1944). Petitioner argues exactly as he did unsuccessfully in *Brownell* v. *Rubinstein*, 346 U.S. 929 (1953), and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1954), that provisions for administrative finality restrict judicial review to habeas corpus. In the *Pedreiro* (Brief, p. 27) and *Rubinstein* (Brief, p. 30) cases it was stated by the Government that Senators Ferguson and McCarran in their colloquy (98 Cong. Rec. 5779) indicated that habeas corpus was the proper remedy for review of both exclusion and deportation orders. In the instant case this colloquy is utilized to suggest that Congressional concern was only with exclusion orders (Brief, p. 33). Moreover, it should be noted that wherever the availability of habeas corpus was discussed in Congressional debates (Pet. Brief, 33n) or elsewhere (*Senate Report 1515*, 81st Congress, 2d Session, p. 629), no statement was made that such remedy was exclusive or that declaratory judgment was unavailable. Congressman Walter, Senator Ferguson, and Senator McCarran all discuss the availability of habeas corpus in both

exclusion and deportation cases (98 Cong. Rec. 4415-4416, 4836, 5779). No distinction was made between exclusion and deportation cases regarding the availability of habeas corpus and in none of these discussions was it stated that other forms of review, such as declaratory judgment actions, would be unavailable. *Fifthly*, as we have indicated in Point II, in the absence of express language to the contrary, the word "final" should have the same meaning in exclusion and deportation cases. *Sixthly*, it is significant that in the Immigration and Nationality Act Congress expressly limited review to habeas corpus in only two instances, i.e., where an alien was detained under 8 U.S.C. 1252 and where he arrived here seeking admission with a certificate of identity under 8 U.S.C. 1503(c). The fact that Congress said clearly what it meant in these sections is strong evidence that it did not mean what it did not specifically say with regard to limiting judicial review to habeas corpus in other exclusion and deportation cases. *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A.D.C. 1953).

The entire course of the legislative history of the 1952 Act, followed chronologically, discloses the understanding and intention of Congress as found by the Court below, that judicial review pursuant to Section 10 of the Administrative Procedure Act, was provided for deportation and exclusion orders:

1. After this Court's decision in *Sung* v. *McGrath*, 339 U.S. 33 (1950), the Immigration Service instituted efforts to secure full exemption from the provisions of the Administrative Procedure Act. H.R. 6652, 80th Congress, 2d Session, sought to relieve the Immigration Service from all provisions except the public information section. Efforts continued with the introduction of the so-called Hobbs Bill in the 81st Congress (H.R. 10), which sought to grant specific exemption from Section 10 of the Administrative Procedure Act and the Declaratory Judgment Act insofar as it

affected the "immigration, exclusion, expulsion or registration of aliens * * *." (*House Report 1192*, 81st Congress, 1st Session, p. 4).

H. R. 10 passed the House of Representatives. In the Senate, the bill failed of enactment after the Senate Judiciary Committee had eliminated the foregoing provisions. (*Senate Report 2239*, 81st Congress, 2d. Session). Efforts to confine judicial review exclusively to *habeas corpus* by express language was made in Section 6 of the revised version of S. 1832 (Senate Report 2230), 81st Congress, 2d. Session. The text of this section was later reintroduced as a part of the bills which became the 1952 Immigration and Nationality Act.

Note should also be made that when the Immigration Service finally secured an exemption from the Administrative Procedure Act in the 1951 Supplemental Appropriations Act (P.L. 843, 81st Congress; 64 Stat. 1048), it was limited to Sections 5, 7 and 8. It did not include Section 10 of the Administrative Procedure Act.

2. At the time the report of the Senate Committee on the Judiciary upon its investigation of "The Immigration and Naturalization Systems of the United States" was filed on April 20, 1950 (Report No. 1515[2] 81st Cong. 2d Sess.) Senator McCarran introduced the first omnibus bill to revise the immigration laws (S. 3455, 81st Congress, 2d Session). This bill provided in Sec. 106 that determinations of law in deportation and exclusion cases should not be subject to review except by habeas corpus.[3] Similar provisions were contained in

[2] Nothing contained in Senate Report 1515, p. 629, states that habeas corpus is the exclusive remedy to review deportation or exclusion orders. The reference merely acknowledges the appropriateness of habeas corpus. Compare the petitioner's claim to the contrary (Brief, p. 25).

[3] Sec. 106. Notwithstanding the provisions of any other law —

(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

a revised bill, S. 716, introduced by Senator McCarran on January 29, 1951 (82d Congress, 1st Session) and in H.R. 2379, introduced by Congressman Francis Walter on February 5, 1951 (82nd Congress, 1st Session).[4] H.R. 2816 (82nd Congress, 1st Session) an omnibus bill introduced by Congressman Celler on February 22, 1951, omitted Section 106 and contained no other comparable section restricting judicial review. Joint hearings were held on these three bills and representatives of numerous organizations recorded their opposition to the provisions restricting judicial review and urged the continued application of Section 10 of the Administrative Procedure Act. These organizations included representatives of the American Bar Association, American Civil Liberties Union, Americans for Democratic Action, American Jewish Committee, Association of Immigration and Nationality Lawyers, Common Council for

---

(b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

[4] Section 106 of S. 716 and H.R. 2379 provided:

"(a) Notwithstanding the provisions of any other law—

(1) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(2) determinations of law other than with respect to liability for the payment of deportation, detention, and related expenses by vessels, aircraft, or other transportation lines, or the master, commanding officer, owner, agent, or consignee thereof, or the imposition of fines and penalties by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(3) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court.

(b) Nothing in subsection (a) of this section shall be held to apply to court proceedings instituted under section 360 of this Act."

American Unity and National Catholic Welfare Conference.[5] *Joint Hearings before the Sub-Committees of the Committees on the Judiciary*, 82d Congress, 1st Session, on S. 716, H.R. 2379, H.R. 2816, pp. 144, 446, 528, 536-7, 591, 617, 699, 735, 739.

It was understood that elimination of Section 106 would leave Section 10 of the Administrative Procedure Act applicable.

3. The revised omnibus bills introduced later in the 82nd Congress, 1st Session (S. 2055, introduced by Senator McCarran on August 27, 1951 and H. R. 5678, introduced by Congressman Walter on October 9, 1951), and a subsequent revised omnibus bill introduced in the 82d Congress, 2d Session (S. 2550, introduced by Senator McCarran on January 29, 1952) eliminated Section 106 of the prior bills and neither the prior Section 106 nor its provisions appear in the 1952 Act. This elimination of Section 106, in the light of the Joint Hearings, discloses a clear intent to permit judicial review under the Administrative Procedure Act.

4. After the elimination of section 106 which would have restricted judicial review in deportation and exclusion cases to habeas corpus, the Senate Committee issued *Senate Report 1137*, 82d Congress, 2d Session (p. 28), which stated:

> "*Exclusion procedures.* In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject to judicial re-

[5] The representative of the American Bar Association did not state that judicial review in exclusion cases should be confined to habeas corpus as claimed by petitioner (Brief, p. 27). On the contrary, he stated (*Joint Hearings*, *supra*, p. 528):

> "Mr. Wasserman. • • • My position is that this bill should be made to conform to section 10 of the Administrative Procedure Act. • • •
>
> "Mr. Blair. Would you apply that in both exclusion and deportation cases?
>
> "Mr. Wasserman. Yes."

view and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. The omission of the language is not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law."

5. The Committee on the Judiciary submitted its report (No. 1365, 82d Congress, 2d Session) on H.R. 5678 to the House on February 14, 1952, and stated (p. 28) that the bill:

"7. Safeguards judicial review and provides for fair administrative practice and procedure (Secs. 235, 242 and 360)."

6. At the inception of the debate in the House on H.R. 5678, Congressman Walter answered a charge that the bill would emasculate judicial review as follows (98 Cong. Rec. 4302):

"The Administrative Procedure Act—do you remember the old Walter-Logan bill, which was subsequently enacted into law as the Administrative Procedure Act? Why, this question of unbridled authority in one person is almost an obsession with me. I am the last person in the world who would do anything to destroy the philosophy underlying that type of review."

Later, Congressman Meader proposed an amendment to the provision of Section 242(b) to the effect that the order of deportation shall be subject to court review. Congressman Walter, co-author of the bill and of the Administrative Procedure Act, opposed the amendment and stated (98 Cong. Rec. 4415):

"* * * judicial review is provided in all these cases, and the gentleman's amendment is surplusage."

Congressman Walter also stated clearly that Section 10 of the Administrative Procedure Act is applicable in the following statement (p. 4416):

"Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but if is not final in that it is not the last remedy that the alien has. *Section 10 of the Administrative Procedure Act is applicable.*" (Italics supplied).

At no time did Congressman Walter state, as contended by petitioner (Brief, p. 34-35) that habeas corpus would be the exclusive means of review in exclusion cases.

7. In the Senate debates Senator McCarran, author of the bill, insisted that it was intended to continue the application of the Administrative Procedure Act except for the special provisions in respect of the conduct of exclusion and deportation proceedings by special inquiry officers. On May 21, 1952, Senator McCarran observed (p. 5626):

> "*Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act,* I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act.
>
> * * * * * *
>
> Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act."

On the following day he stated (p. 5778):

> "* * * *the Administrative Procedure Act is made applicable to the bill.* The Administrative Procedure Act prevails now."

It was upon these assurances that many Senators voted in favor of the bill. It is true, however, that Senator McCarran was concerned lest court review be granted over consular decisions to aggrieved persons throughout the world.

This occasioned his statement at 98 Cong. Rec. 5789 quoted at page 32 of petitioner's brief and the foregoing committee report (*Senate Report 1137, supra*) that judicial review was not to be granted over "determinations made by consular officers."

8. The statement of the managers on the part of the House which accompanied the Conference Report on the disagreeing votes of the two Houses on the amendments of the Senate to H.R. 5678 on June 9, 1952, (*House Report 2096*, 82d Congress, 2d Session, p. 127), contains the final agreement as to Congressional action on judicial review of immigration matters. It states:

> "(2) Having extensively considered *the problem of judicial review*, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, *remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.*"

The petitioner attempts to say that the foregoing quotation means that, in deportation cases judicial review included declaratory judgment action but in exclusion cases such review was to be confined to habeas corpus proceedings. Statements of legislators in conflict with committee reports are not to be taken as persuasive of Congressional intent. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1941). What is persuasive here is that the final conference report treated exclusion and deportation alike. Neither was confined to habeas corpus. Both were to be within "the framework and pattern of the Administrative Procedure Act."

It is submitted, therefore, that the elimination of the provisions confining judicial review of deportation and exclu-

sion orders to habeas corpus proceedings, statements on the floor of Congress by the authors of the bill, and the final conference report, disclose a clear understanding that section 10 of the Administrative Procedure Act was to be equally applicable to deportation and exclusion orders.

(C) The Structure of the 1952 Immigration and Nationality Act Indicates that a Habeas Corpus Restriction on Judicial Review Exists in only Two Instances.

The provisions of the 1952 Act support the conclusion concerning judicial review already reached from an examination of the legislative history.

Where Congress intended that habeas corpus should be the mode of judicial review of specific questions it so provided by express language in the 1952 Act. Sections 242(a) and (c) [8 U.S.C. 1252(a) and (c)] expressly provide that the separate and distinct question of the legality of the custody of an alien actually held in custody for a hearing or for deportation might be reviewed in habeas corpus. This question is quite distinct from the question of the legality of a deportation order. Section 360(c) [8 U.S.C. 1503(c)] also restricts to *habeas corpus* excluded applicants for admission arriving on certificates of identity. These express provisions limiting review to habeas corpus only in specific situations, contained in the 1952 Immigration Act but not in previous immigration legislation disclose an intention to allow other types of judicial review in other cases such as the instant case.

Petitioner states that the statutory provisions relating to the exclusion of aliens generally must be read in the light of Section 360 of the 1952 Act (Brief p. 21). Quite the contrary were the statements of the Government in its *Rubinstein* and *Pedreiro* briefs in this Court. In the *Rubinstein* brief the Government said (pp. 38-39):

> "Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or without the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360 of the 1952 Act is to make that judicial procedure unavailable to persons outside the United States and to provide for the determination of the claims of limited groups of such persons by the Attorney General in administrative exclusion proceedings. * * * *It has nothing to do with ordinary exclusion cases as to which Section 236(c) provides, like the former exclusion statute which was before this Court in Tom We Shung v. Brownell, decided per curium December 7, 1953, that the administrative decision shall be final.* (Italics supplied).

In the Pedreiro brief (p. 35) the Government repeated with reference to Section 360:

> "It has nothing to do with ordinary exclusion cases as to which Section 236(c) (8 U.S.C. 1226 (c)) merely provides, like the former exclusion statute * * * that the administrative decision shall be 'final.' "

If anything, Section 360 supports the judgment below. Congress has in the limited cases therein mentioned specifically directed that habeas corpus proceedings shall be the exclusive remedy. No such specific direction is to be found with reference to the ordinary exclusion case under Section 236(c). The fact that Congress said clearly what it meant in Section 360(c) with regard to those seeking admission with certificates of identity (a practice which lent itself to fraud and other abuses) is strong evidence that it did not mean what it did not specifically say in Section 236(c) with regard to exclusion cases generally.

The purpose of amending the previous law (8 U.S.C. 903) arose from the use of such section by numerous per

sons of Chinese origin "to gain entry into the United States where no such right existed." *Senate Report 1515, supra*, p. 777. See also: *Joint Hearings on S. 716, H.R. 2379 and H.R. 2816, supra*, p. 108; 66 *Harvard Law Review* 744 (1953). The objective of Section 360 of the Immigration and Nationality Act was to deprive these spurious citizenship claimants outside the United States of the special declaratory judgments procedures under 8 U.S.C. 903 which enabled them to gain easy entrance into the United States.[6] Section 360(c) specifically provides that only those arriving here with certificates of identity shall be restricted to habeas corpus review. Such was the case of the appellant in *Hsiang* v. *Brownell*, 234 F. 2d 232 (C.A. 7, 1956). Section 360, however, does not deny declaratory judgment action to citizenship claimants outside the United States who have not been issued such certificates. *Ngow v. Dulles*, 122 F. Supp. 709 (D.C. Dist. of Col. 1953).[7] Indeed, were the petitioner's contrary view adopted, a serious constitutional issue would be posed by a situation in which citizenship claimants are deprived of their nationality without either an administrative hearing or judicial review. 66 *Harvard Law Review* 744-745 (1953). Accordingly, the

---

[6] "It is quite obvious that the purpose of modifying the special remedy prescribed by the Nationality Code of 1940 was to limit and circumscribe the right to procure a certificate of identity, because manifestly it was capable of abuse." *Ngow* v. *Dulles*, 122 F. Supp. 709 (D.C. Dist. of Col. 1953).

[7] *Ngow* v. *Dulles*, *supra*, is not contrary to *D'Argento* v. *Dulles*, 113 F. Supp. 933 (D.C. Dist of Col. 1953) which it distinguishes. D'Argento did not exhaust his administrative remedies. This was also true in *Leisa* v. *Brownell*, 112 F. Supp. 15 (S.D. Texas, 1953). *Ng Gnoong Dinn* v. *Brownell*, 112 F. Supp. 673 (S.D.N.Y. 1953), decided before the *Pedreiro* case, relies upon *Heikkila* v. *Barber*, *supra*. *Vasquez* v. *Brownell*, 113 F. Supp. 722 (W.D. Texas, 1953), is a deportation case decided before and contrary to the *Pedreiro* case. *Hsiang* v. *Brownell*, 234 F. 2d 232 (C.A. 7, 1956), is inapposite as appellant came here with a certificate of identity or travel affidavit. He is therefore clearly within the explicit restriction of Section 360.

alleged disparity between citizenship claimants and excluded aliens is non-existent and the Government was correct, the first time, when it stated in its *Rubinstein* and *Pedreiro* briefs, that the problem posed herein must be decided without reference to section 360.

(D) Practical Considerations Support the Decision Below

The practical considerations discussed by petitioner (Brief, p. 42) do not coincide with the conflicting official explanations on the subject by the Department of Justice. Moreover, these considerations are hardly determinative of the issue presented herein.

On February 8, 1956, Deputy Attorney General William P. Rogers advised the Senate and House of Representatives in identical communications as follows:

> "It is believed that since an alien who has been excluded is ordinarily held in custody, habeas corpus provides a wholly adequate remedy for the judicial review of exclusion orders * * *."

However, the *Annual Report of the Immigration and Naturalization Service* for the fiscal year ended June 30, 1955, recites (p. 6):

> "*Detention and Parole of Applicants for Admission.* Detentions of aliens were at the lowest figure in the history of the Service at the close of 1955. This was accomplished through a new detention policy begun in November, 1954, under which only those aliens likely to abscond and those whose release would be inimical to the national security are detained. Many aliens whose papers were not in order were previously detained at Ellis Island and other facilities. Under the present policy, most aliens with purely technical difficulties are allowed to proceed to their destination under 'parole.'
>
> "Within ten days of the change, the number of

aliens in detention in New York City dropped to about 25, compared with a usual detention population of several hundred."

Thus, it will be seen that most excluded aliens are not in custody pending administrative and judicial review, and habeas corpus is unavailable. Practical considerations, therefore support the judgment below.

There is no reason why here, as in deportation cases, an alien should be in jail in order to seek court review. Court review will be denied entirely to many aliens if habeas corpus is to be the exclusive method of review. Excluded aliens fall into three categories—(a) those who are detained representing an extremely small percentage, (b) those on parole like the respondent, (c) those stopped at our land borders and refused admittance. The last category represents a large number of aliens who are never detained and who will be denied court review if resort to habeas corpus is necessary.

An alien who seeks admission to the United States is accorded a hearing before a special inquiry officer whose decision is subject to appeal. 8 U.S.C. 1226(c). Appeals consume many months. Pending administrative appeals, a native of Argentina or an alien from a remote part of Canada, returns home rather than to risk an uncertain waiting period at our land borders. Offering such an alien custody at our land borders after exhaustion of administrative remedies as a prerequisite to the institution of judicial review is one method by which litigation may be discouraged and prevented. The recent unpublished suggestion of the Commissioner of the Immigration and Naturalization Service, formulated after this litigation and set forth in footnote 15 of petitioner's brief (p. 42), for excluded aliens to submit voluntarily to custody so they may litigate the legality of exclusion orders is contrary to the

announced policy of only detaining subversives and absconders. Voluntary submission to custody by persons normally stopped at our borders solely for the purpose of permitting habeas corpus litigation may well be regarded as collusive. Where there is voluntary submission to the authorities, habeas corpus cannot be brought because there can be no deprivation of freedom through a voluntary act. *United States v. Estep*, 150 F. 2d 768, 772 (C.A. 3, 1945), reversed on other grounds, 327 U.S. 114; *Ex parte Simon*, 208 U.S. 144 (1907); *United States v. Peckham*, 143 Fed. 625 (N.D.N.Y. 1906), 39 C.J.S. 440.

Those on parole like respondent who entered the United States at San Francisco, do not remain at the port of entry. Respondent now lives in Philadelphia. Petitioner would have him pack up, wind up his affairs, and travel across the United States to detention in San Francisco in order to secure court review. If respondent is successful in judicial proceedings or if deportation may not be effectuated to Communist China, then respondent would be permitted to recross the United States to Philadelphia and reestablish himself. The petitioner's view would make litigation expensive, inconvenient and burdensome to the alien. In addition for the alien paroled for years as in the instant case, litigation would be precluded until the day of detention. The Immigration Service notifies an alien to report for detention a day or two days prior to deportation. Confined to habeas corpus, the paroled alien must hazard the risk of securing a court to sign a writ of habeas corpus during the day of his detention and before his jailer ships him overseas. Judicial criticism is not lacking in those cases where our immigration authorities attempted to spirit aliens away while a writ of habeas corpus was being sought. See *U.S. ex rel. Circella v. Neely*, 115 F. Supp. 615 (D.C.N.D. Ill. 1953), affirmed 216 F. 2d 33 (C.A. 7, 1954). Finally it

should be noted that declaratory judgment actions may be handled expeditiously. Under Rule 57 of the Rules of Civil Procedure such actions may be advanced on the calendar.

IV

Declaratory Judgment Is Maintainable to Review the Status Question Presented

In *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Heikkila* v. *Barber*, 345 U.S. 229, 236 (1952); and *Rasmussen* v. *Brownell*, 350 U.S. 806 (1955), this Court recognized that citizenship and eligibility for citizenship were status questions which could be litigated in declaratory judgment actions. In the instant case there is involved a clear issue of status, i.e., whether respondent is the son of an American citizen. Under the above cited cases, declaratory judgment is maintainable to review this status question. Petitioner properly acknowledges (Brief, p. 48) that this issue was not raised in the prior action herein nor in the prior petition for certiorari. The previous dismissal for lack of jurisdiction (346 U.S. 906) cannot therefore be taken as an adjudication of an issue which was neither argued nor presented to this Court.

Conclusion

The decision below correctly follows this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955). Judicial review is not precluded in exclusion cases by the express or implied language of the Immigration and Nationality Act of 1952. The Administrative Procedure Act requires an express exemption precluding judicial review which is wanting here. The provisions for administrative finality of exclusion and deportation decisions utilize the same language and should be accorded the same meaning. Pertinent considerations of statutory language, legislative his-

tory and practical effect support the view that the holding below should remain undisturbed.

The issue as to whether respondent is the son of an American citizen presents a status question, reviewable under this Court's decision in *Heikkila* v. *Barber*, 345 U.S. 229 (1953).

Upon the basis of the *Pedreiro* and *Heikkila* cases, the judgment below should be affirmed.

JACK WASSERMAN,
902 Warner Building,
Washington 4, D. C.,
ANDREW REINER,
320 Broadway,
New York 7, New York,
Attorneys for Respondent.